

Lauher was focused on a desire to hire minorities. (Tr. 140).^{25/}

69. In April 1988, Arnold & Porter sent its broadcast clients (including KFUE) a one-page letter beginning: "While the FCC has in recent years taken a more relaxed approach to enforcement of a number of its rules, the enclosed FCC release indicates that the Commission is still prepared to enforce its equal opportunity requirements." In regard to a condition which the Commission had recently imposed on a station in North Carolina, the law firm noted that: "While the condition is not onerous . . . it is inconvenient, and something of a 'black mark' on the station's record." (Church Ex. 8, pp. 3-4; Church Ex. 8, Att. 3).

70. In the Fall of 1988, as the result of attendance by FM general manager Thomas Lauher at a Missouri Broadcasters Association ("MBA") meeting, KFUE began a broad re-examination of its outreach efforts and its general compliance with the Commission's EEO requirements. (Church Ex. 4, p. 12). The MBA meeting was essentially a license renewal seminar to inform

^{25/} Mr. Lauher's written testimony stated, in connection with the hiring of sales workers at KFUE-FM, that the Stations "wanted to hire a variety of people and wanted to hire a minority." (Church Ex. 6, p. 1). At the hearing, Mr. Lauher testified that the draft had stated that the Stations wanted to hire "minorities" for sales positions and that there had been a typographical error. (Tr. 103-04, 126). This testimony was credible, especially because a later sentence in Mr. Lauher's testimony states: "As I have mentioned, we had minority and female employees during the period that I worked at KFUE-FM and the station actively sought to obtain minority and female employees." (Church Ex. 6, p. 3 (emphasis added)).

broadcasters of the FCC's current requirements, including EEO requirements. According to Mr. Lauher, the message that came through during that seminar was "don't be lulled into complacency because there is deregulation." After attending this seminar, Mr. Lauher determined to review the station's compliance status which included compliance with the FCC's EEO requirements.

(Church Ex. 6, p. 2; see also Tr. 144).

71. During Mr. Lauher's review continuing from the Fall of 1988 until April 1989, the Stations continued to rely on employee referrals and the St. Louis Broadcasting Center for five full-time hires. (Church Ex. 6, pp. 2-3; Church Ex. 4, Att. 6, pp. 5-6). The Stations did not hire any additional minorities during this period. As of the pay period ending January 31, 1989, however, with the addition of Ms. Perez as a salesperson, the Stations' minority employment was at 29.1% of parity in the Top Four job categories and 24.7% of parity overall. (Church Ex. 4, Att. 12, p. 4; NAACP Ex. 24, pp. 32-33; see supra ¶ 67 (hire of Ms. Perez)).

72. Near the beginning of his review, Mr. Lauher had discussions with Marcia Cranberg, the Stations' primary communications lawyer, concerning the Commission's EEO requirements. (Church Ex. 6, p. 2). At approximately the same time, November 1, 1988, Arnold & Porter sent its broadcast clients, including KFUD, a letter informing them of the decision of the U.S. Court of Appeals for the D.C. Circuit in Beaumont Branch of the NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988). The law firm noted that "[t]he decision makes it likely that the FCC will

consider more carefully in the future renewal challenges based on EEO grounds." (Church Ex. 8, p. 4; Church Ex. 8, Att. 4).

73. After receiving Arnold & Porter's November 1, 1988 letter, Mr. Lauher made inquiries to Ms. Cranberg concerning the FCC's renewal requirements. (Church Ex. 8, p. 4; see also Tr. 1008, 1035). On December 20, 1988 -- apologizing for her delay -- Ms. Cranberg sent Mr. Lauher a copy of the FCC's rules setting forth its EEO requirements, and copies of KFUE's most recently filed EEO related forms. (Church Ex. 8, p. 4). Ms. Cranberg told Mr. Lauher in the December 20, 1988 letter that she had been assured by FCC staff that it would be acceptable if KFUE(AM) and KFUE-FM filed a single EEO program. (Church Ex. 8, p. 4; Church Ex. 8, Att. 5). Mr. Lauher then reviewed the Stations' existing EEO program. (Tr. 136-39; see NAACP Ex. 25 (copy of then existing program)).

74. Arnold & Porter's letter of December 20, 1988 was the first letter in which the firm had addressed any EEO issues specific to KFUE (as opposed to all its broadcast clients) during the License Term. (Church Ex. 8, p. 4). As noted above, the Stations had not believed that previous Arnold & Porter "advisories" had been directed to their peculiar needs. (See supra ¶ 66).

75. As the result of his discussions with counsel and his review of the Stations' policies and procedures, Mr. Lauher prepared a memorandum to Reverend Paul Devantier (the Stations' CEO) dated March 9, 1989, regarding "License Renewal." (Church Ex. 6, p. 2; Church Ex. 7, Att. 5). The memorandum attempted to

give a "comprehensive review of performance, recommendations for improvements, and an outline of areas in which there [was] concern" in connection with the forthcoming license renewal. (Church Ex. 7, Att. 5, p. 1).

76. Mr. Lauher noted in the memorandum that EEO compliance was "the most critical in license renewal. . . . The question is: Is the station following its own plan?" The memorandum then stated: "As described below there are plenty of areas for improvement in our compliance. At the time the AM and FM operations were absorbed into the Synod certain procedures, forms, job descriptions, etc. were introduced which inadvertently put the stations in a non-compliance situation." (Church Ex. 7, Att. 5, p. 5). Later in the memorandum, Mr. Lauher stated that he had "discovered we are operating in violation of our own policy as currently on file. I have reason to believe this applies to the AM operation as well as the FM operation." (Church Ex. 7, Att. 5, p. 7). However, Mr. Lauher immediately added in his memorandum that he had "taken steps in good faith to assure full compliance in FM." (Church Ex. 7, Att. 5, p. 8). More crucial, Mr. Lauher specified in his memorandum the three areas in which he believed that the Stations' "performance" differed from its "EEO promises." (Church Ex. 7, Att. 5, p. 8). Each specified area involved only forms and job descriptions, and not the Stations' recruitment efforts, much less their policy of non-discrimination. The areas specified were:

(a) The station's EEO Report on file at the FCC continued to show that Reverend Abatie, former General Manager of

KFUO(AM) and KFUE-FM, was responsible for administration and implementation of the EEO program. (See NAACP Ex. 25, p. 2 (existing form with Reverend Abatie's name)). A new person or persons needed to be named, and a decision needed to be made about whether one person should be responsible for both stations. (Church Ex. 7, Att. 5, p. 8; Tr. 151-52).

(b) The application form in use at KFUE did not contain the statement which the EEO Program on file at the Commission stated the form would contain. Specifically the 1983 EEO Program had stated: "The station's employment application form contains a notice informing prospective employees that discrimination because of race, religion, national origin or sex is prohibited and that they may notify the appropriate local, state or federal agency if they believe they have been the victims of discrimination." (NAACP Ex. 25, p. 2). As Mr. Lauher stated in his memorandum, however: "Somehow, this was dropped at some point when revised application forms were printed." (Church Ex. 7, Att. 5, p. 9).^{26/} Mr. Lauher explained at the hearing that the commitment "was a clear part of the policy but it had been in some manner inadvertently dropped from this application." (Tr. 164 lines 22-25). Mr. Lauher was also concerned that this application form in use at both Stations stated that "[b]ecause we are a church body, the Lutheran Church-Missouri Synod retains the right to give preference in the hiring of persons who are

^{26/} See NAACP Ex. 31, p. 4 for an example of an earlier application form which had in fact contained the notice reported in the EEO Program on file at the Commission.

members in good standing of an LCMS congregation," and that the form asked applicants for religious affiliations. (Tr. 155-56; M.M. Bur. Ex. 25).

(c) Finally, there was a problem with job descriptions, which needed to be "job specific, held to a minimum and . . . completely objective." The job descriptions at the Stations needed, according to Mr. Lauher, to be reviewed and changed where necessary to meet this requirement. (Church Ex. 7, Att. 5, pp. 9-10).

77. In his testimony, Mr. Lauher confirmed that his "concern at the time [he] prepared the memorandum was that a common application form was used for both the AM and FM stations and that within the form there was some language relating to theological experience that might not be appropriate for all hires." He testified that he was also concerned that some of the job descriptions for the FM station might not reflect the Stations' EEO policies because the opening paragraphs spoke about serving the Lutheran Church. (Church Ex. 6, p. 2). In general, Mr. Lauher was concerned in 1989 that a joint EEO program for both KFUD(AM) and KFUD-FM "might create a difficulty in impression, confusion because there were some, as Marcia [Cranberg] suggested, legitimate reasons for the AM to ask questions of a religious nature . . . although the FM would not be hiring people with that kind of background or requirement." (Tr. 152 lines 16-22).

78. Mr. Lauher also confirmed in his testimony that his March 9, 1989 memo did not deal with recruiting efforts -- KFUD-

FM had increased the number of women employees at the station and had recently hired a minority salesperson, Caridad Perez.

(Church Ex. 6, p. 2; Tr. 193-94). Mr. Lauher testified: "I think in the . . . few hires that had been made at the time I was there that . . . the FM station had . . . been doing what it should do." (Tr. 175 lines 8-13; see also Church Ex. 6, p. 2). He added that when he said on page 7 of his memo that "we are operating in violation of our own policy as currently on file," he did not mean that KFUD-FM was violating FCC policies but simply that if there was to be a combined EEO policy for the AM and FM stations, there appeared to be a contradiction with the requirement for religious training for a number of the positions. He noted that his reference on page 5 to "inadvertent noncompliance" referred to the same issue. (Church Ex. 6, p. 2).

79. On March 15, 1989 (six days after his first memorandum), Mr. Lauher prepared another memorandum to Reverend Devantier concerning the Stations' EEO compliance. (Church Ex. 4, p. 13; Church Ex. 4, Att. 11; Church Ex. 6, pp. 2-3). In this memorandum, Mr. Lauher reviewed the list of "defensive measures" contained in the EEO Handbook, A Practical Guide for Broadcasters. Mr. Lauher stated:

Out of the 130 measures listed, KFUD-FM has implemented or completed 79. Ten of the measures appear to be "Not Applicable" to our situation. The remaining 41 measures are currently being reviewed to see whether the action has been taken, needs to be taken or is not applicable to our situation.

(Church Ex. 4, Att. 11, p. 1; see Church Ex. 6, p. 3 (Lauher testimony that he believed KFUD-FM had implemented approximately

70 of the items and that the remainder were either not applicable to the station or under review)). It should be noted that among the items Mr. Lauher checked as "implemented or completed" by KFUD-FM (Tr. 166) were: (a) taking EEOC matters seriously; (b) evaluating all employment practices, and eliminating those that have an adverse impact on minorities; and (c) conducting "a continuing campaign to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, or sex from the station's personnel policies and practice and working conditions." (Church Ex. 4, Att. 11, pp. 2, 4). Thus, this memorandum confirms that Mr. Lauher's concerns did not relate to the Station's commitment to non-discrimination. (See Church Ex. 6, p. 2; Tr. 175 lines 8-13). Mr. Lauher did not check an item referring to a continuing review of employment practices and recruitment and did not recall at hearing that such a formal review had been done. (Tr. 171 lines 11-20). The fact that there was no check, however, did not mean that a step had not been taken, but merely that personnel were still "double-checking" whether it had been accomplished. (Tr. 178 line 24 - 149 line 7; see also Church Ex. 4, Att. 11, p. 1).

80. Subsequent to sending these memoranda, Mr. Lauher and Reverend Devantier had a discussion in which Reverend Devantier raised a question about whether some of the items on the checklist pertained to religious stations. Importantly, Reverend Devantier advised Mr. Lauher to proceed to do what needed to be done to assure continuing EEO compliance. (Church Ex. 6, p. 3;

Church Ex. 7, p. 10; Tr. 180 (Lauher testimony); Tr. 855 (Devantier Testimony)).

81. As a result of Mr. Lauher's memoranda, at a meeting on April 5, 1989, Reverend Devantier notified the Standing Committee of the Church's BCS (assigned by the Church with responsibility to supervise the Stations since 1987) of the "importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs." (Tr. 858-59; Church Ex. 7, p. 10; see also Church Ex. 7, Att. 7; see supra ¶¶ 23-24 (description of BCS)). The Standing Committee did not accept Mr. Lauher's recommendation that a separate EEO program be created for each of the Stations -- both the Standing Committee and Reverend Devantier believed KFUD(AM) and KFUD-FM had similar purposes and affiliation with the Church and were not so distinct that they needed separate EEO programs. (Tr. 856-57).^{27/}

^{27/} When he assumed the position as "CEO" of the Stations in 1986, Reverend Devantier had taken steps to assure that the Church's policy of non-discrimination and equal opportunity was in effect at the Stations. For example, he had assured that the Church's employment manual, containing a statement concerning Equal Employment, was distributed to all employees. (Church Ex. 7, pp. 8-9; Church Ex. 7, Att. 4). Reverend Devantier also visited the Stations' facilities approximately once a week to oversee the Stations and to ensure that the Church's policies were observed. (Church Ex. 6, p. 11). For the implementation of the details of the Stations' EEO policies, Reverend Devantier relied on the operational chiefs at the Stations. (Church Ex. 7, p. 9).

From his vantage point, Reverend Devantier believed that the Stations' operational supervisors were implementing the affirmative action efforts required by the FCC. He based these beliefs on the following:

(continued...)

^{27/} (...continued)

- (a) He had been involved in hiring the Stations' managers and knew them to be competent, responsible people of good character.
- (b) When he had been General Manager of the Stations in the 1970's, the Stations had always been committed to equal opportunity for all. Indeed, Reverend Devantier had promoted an African-American woman, Lula Daniels, from secretary to a managerial position as Coordinator of Worship Programming. He had no reason to believe that the Stations' policies had changed from their commitment to equal opportunity employment at any time after his tenure as General Manager.
- (c) He discussed with each of the General Managers during the License Term the Stations' commitment to equal employment opportunity and the desirability of hiring minority employees. (See Tr. 824, 826 (minority applicants and employees discussed on a regular basis)). Based on these discussions, Reverend Devantier believed that the managers were committed to maintaining the EEO policies. Although no one was explicitly charged in a position description with noting the presence or absence of minority applicants at the Stations, managers were generally charged with day-to-day EEO compliance. (Tr. 819-21, 823-24). The first and only time during the License Term that a manager told Reverend Devantier that it was desirable to modify the Stations' EEO procedures was when Mr. Lauher sent the two memoranda on the subject in March 1989.
- (d) Reverend Devantier knew the Stations had highly respected communications counsel, the firm of Arnold & Porter, because that firm had been the Stations' counsel when he was General Manager. He believed that he would hear directly from the firm if FCC rules or policies changed in a way which would have required dramatic changes in the Stations' EEO program. He did not receive any such communications from counsel. (Tr. 809-10).

(continued...)

82. Shortly after his meeting with Reverend Devantier, Mr. Lauher requested information from Ms. Cranberg concerning the relationship between KFUE's religious affiliation and the EEO requirements. (Church Ex. 8, p. 5; Church Ex. 7, p. 2). Arnold & Porter had not addressed this issue in any of its client advisories. (Church Ex. 4, p. 13; Church Ex. 8, p. 5). By letter of April 4, 1989, Ms. Cranberg advised Mr. Lauher that under the King's Garden case, it was permissible for the Stations to use a religious criterion for any jobs which were connected with the "espousal of religious views." Ms. Cranberg stated in her letter that although King's Garden dated from the mid-1970's, she had been assured that its "general guidelines" were still in force. (Church Ex. 8, p. 5; Church Ex. 8, Att. 6).

83. Following his re-examination of the EEO rules, his discussions with Reverend Devantier indicating that he should do what needed to be done, and the letter from Ms. Cranberg, FM General Manager Lauher circulated on April 26, 1989 a packet of updated materials to be used in the hiring process. Mr. Lauher was concerned that the FM station should be sure that it had made

^{27/} (...continued)
(Church Ex. 7, pp. 9-10).

In the Stations' renewal applications filed in September 1989, Reverend Devantier was identified as the person responsible for implementation of the Stations' EEO program. (Church Ex. 4, Att. 16, p. 6). He was so identified because as of the date of the application (September 29, 1989), he was the Stations' CEO, the newly-hired general manager of KFUE(AM) had not started working, and no permanent general manager of KFUE-FM had been hired. (Church Ex. 4, pp. 16-17; Church Ex. 7, pp. 10-11; Tr. 860-61 (Devantier testimony that had there been a general manager at the time, his or her name would have been on the report)).

it very clear to recruitment sources that it was actively seeking minority and female applicants. (Church Ex. 6, p. 3). The materials included a revised employment application which included the language concerning notifications to EEO agencies that had earlier been inadvertently dropped, and which deleted the statement about a preference for members of the Church. (Tr. 184). The package also included policies on EEO, and an EEO Data Form and Applicant Flow Chart. (Church Ex. 4, Att. 13).

84. In July 1989, Mr. Lauher also took from an "NAB guidelines reference book" and caused the FM station to send to at least ten local universities and personnel agencies, letters stating that the station encouraged minority and female applicants and seeking help in recruiting minorities and females. (Tr. 188-89; Church Ex. 4, Att. 14). Such requests for help in recruiting went to:

Roth Young Personnel Service of St. Louis
University of Missouri (at St. Louis)
Meramec Community College^{28/}
The Broadcast Center
Southern Illinois University
Lindenwood College
John N. Olin School of Business
(at Washington University)
St. Louis Community College
Snelling & Snelling (of Clayton)
Sales Recruiters Irvin Edwards

These letters sought minority applicants for all openings which might occur, and therefore did not mention job qualifications for

^{28/} Mr. Lauher believed that Meramec College had a high enrollment of minorities. (Tr. 190). In the KRJY Opposition, the NAACP's "experienced" broadcaster stated that Meramec Community College was a relatively "fertile" source of minority referrals. (Church Ex. 12, p. 8).

any specific positions. (Church Ex. 4, pp. 14-15; Church Ex. 4, Att. 14). Mr. Lauher sent the letters because the lawyer conducting the "fall meeting of the Missouri Broadcasters Association . . . led me to feel regardless of what had been done at any prior time that it was best to err on the side of making sure, and that's all I felt that we were doing there was just making sure." (Tr. 189 lines 8-13).

85. Thereafter, in part because of turnover in managerial personnel in the summer of 1989, the EEO forms were not consistently used during the remainder of that year. (Church Ex. 4, p. 15).^{29/} As Mr. Stortz stated in a memorandum he drafted in January 1990, the two new managers of KFUE(AM) and KFUE-FM in October 1989 had to analyze any previous problems of non-compliance with the Stations' affirmative action plan by studying the records when they began their jobs. (NAACP Ex. 48, p. 1). However, as the result of several client advisories from communications counsel Arnold & Porter during 1989, the Stations further augmented their efforts to comply with EEO requirements. (Church Ex. 4, p. 15; M.M. Bur. Exs. 20-23). For example, during 1989 the Stations began seeking referrals from the Lutheran Employment Project of St. Louis, a clearinghouse run by various

^{29/} Mr. Lauher himself left KFUE-FM in July 1989. His departure had nothing to do with his efforts concerning EEO but related to the station's failure to meet sales expectations. (Church Ex. 6, p. 3; Tr. 868). As discussed above, Reverend Devantier visited the Stations' facilities approximately once a week to oversee the Stations and to ensure that the Church's policies were observed. (Church Ex. 4, p. 11; Tr. 816). Dennis Stortz assumed day-to-day responsibility during this period. (Tr. 816).

Lutheran churches to assist in employment of members of minority groups. (Church Ex. 4, p. 15).

86. In November 1989, KFUD interviewed three minority persons referred by the Lutheran Employment Project, and hired one of them, an African-American, Ms. Cynthia Blades. (Church Ex. 4, p. 15; Tr. 754). The Stations did, however, continue to utilize employee referrals and resumes on file to fill certain openings during 1989. (Church Ex. 4, Att. 6, pp. 6-7).

87. In January 1990, Dennis Stortz used EEO data forms and EEO recruitment program forms in connection with new hires that would serve both KFUD(AM) and KFUD-FM. (Church Ex. 4, p. 15, Church Ex. 4, Att. 15). Moreover, at that time, the Stations continued to contact the Lutheran Employment Project and also contacted an outreach ministry for minority employment in northern St. Louis (Lutheran North St. Louis Outreach) operated by Otis Woodard. (Tr. 540). An employee of the Stations, Angela Burger, made contact with this ministry through the ministry's vice-president, Kathryn Woodard. (Tr. 1095). The outreach ministry referred prospective candidates, but none chose to fill out applications. (Church Ex. 11, pp. 1-2; see also NAACP Exs. 11 and 15).^{30/}

^{30/} In reporting this outreach effort to the Commission, Dennis Stortz referred to the Outreach Ministry as Otis Woodard's ministry, because he had reviewed a form prepared by Ms. Burger stating she had contacted "Outreach Ministries" through "Kathy Woodward" and Mr. Stortz knew of this organization as Otis Woodard's Outreach Ministry. (Church Ex. 11; Tr. 1094-95).

88. In January 1990, the Stations also advertised in newspapers, such as the St. Louis American and the St. Louis Sentinel whose target audiences were African-American, for the then-existing job vacancies. (Church Ex. 4, p. 15; Church Ex. 4, Att. 9; Tr. 539). An African-American, Timothy Meeks, was in fact hired through the St. Louis American. (Church Ex. 4, Att. 6, p. 8).^{31/} By that time, the Stations had begun to recruit more vigorously and had also received the NAACP's petition to deny. (Tr. 544). The CEO of the Stations, Reverend Devantier, expressed regret in his testimony that the Stations had not done more at an earlier date. (Church Ex. 7, p. 11).^{32/}

^{31/} In making hires in January 1990, the Stations used a rating form developed by Ms. Burger. (Tr. 726-27; NAACP Ex. 63). Ms. Burger brought the form with her from a prior job and had not done job interviews for the Stations prior to January 1990. (Tr. 726-27).

^{32/} The NAACP's "experienced" broadcaster witness, Richard Miller, stated in the KRJY Opposition that contacts with minority-oriented organizations had "not been fruitful." (Church Ex. 12, p. 8). KFUE's experience with minority-oriented newspapers may therefore have been better than the NAACP's witness would have predicted.

In his testimony in this case, Mr. Miller also claimed that if KFUE really wanted to get African-American salespeople, it would "simply" have needed to go to the "ad agencies." (NAACP Ex. 12, p. 2). It is important to note, however, that in defending his own station against the NAACP's challenge in the text of the KRJY Opposition, Mr. Miller nowhere mentioned the use of "ad agencies" or stated that such agencies had been useful in attracting minorities. (See Church Ex. 12). The only mention of an advertising agency is on page 6 of Exhibit 2 to the KRJY Opposition where the licensee noted that it had hired a white male sales manager referred by an advertising agency and that it failed to contact any other referral source for that opening. (Church Ex. 12). For many of the other openings at KRJY, Mr. Miller contacted the same recruiting sources used by KFUE. (See supra Notes 14, 19, 20, 28).

(continued...)

89. During the approximately ten month period after the Stations did their review of their EEO policies (i.e., from March 1989 to January 1990), the Stations hired 13 full-time employees of whom three (22%) were African-American. (Church Ex. 4, Att. 6, pp. 6-8). The Stations sought referrals (including Lutheran publications and employee referrals) for at least nine of the thirteen full-time hires. (Church Ex. 4, Att. 6, pp. 6-8).

90. During the last 2-1/2 year period of the License Term after the FCC revised its EEO rules, the Stations hired 24 full-time employees, of whom four (16%) were minority. (Church Ex. 4, Att. 6, pp. 4-8). The Stations sought referrals (including

^{32/} (...continued)

In his testimony, Mr. Miller also stated: "These days, every major broadcast company has managed to comply with the EEO Rule and doesn't rely on excuses." (NAACP Ex. 12, p. 2). Insofar as this was supposed to be a criticism of the arguments offered by the Church, it should be noted that in his own KRJY Opposition, Mr. Miller himself had stated: "[KRJY's] record [of hiring minorities] is especially impressive given obstacles such as candidates' unwillingness to relocate to St. Louis and the 1987 change to a satellite format which considerably reduced staffing requirements." (Church Ex. 12, p. 6 (emphasis added)). Also, as discussed above, Mr. Miller himself cited many of the same recruiting sources used by the Church (see supra Notes 14, 19, 20, 28), and argued that minority-oriented sources "had not been fruitful." (Church Ex. 12, p. 8).

Although Mr. Miller claimed that "all stations" comply with the EEO Rules, his own KRJY was admonished by the Commission to contact outside recruitment sources for every vacancy because KRJY had failed to do so for more than half of its vacancies from October 1, 1986 to August 1, 1989. (Church Ex. 13, p. 6). From October 1, 1986 to the end of the License Term, the Church's Stations sought applicant referrals for at least 18 of 31 full-time hires, including outside recruiting sources and employee referrals. (Church Ex. 4, Att. 6, pp. 3-8).

Lutheran publications and employee referrals) for at least 14 of these 24 hires. (Church Ex. 4, Att. 6, pp. 4-8). As of the pay period ending January 31, 1990, the Stations' minority employment was at 71.2% of parity, but there were no minority employees in Top Four category jobs. (Church Ex. 4, Att. 12, p. 4).

91. Because the Stations had publicized openings through minority employee referrals and external recruitment during the License Term, and in July 1989 had sent recruitment letters to at least ten local universities and personnel agencies stating that KFYO-FM encouraged minority applications and seeking help in recruiting minorities, Dennis Stortz added a sentence to the section on "Recruitment" in the Equal Employment Opportunity Program in the Stations' 1989 renewal applications telling the FCC that the Stations "actively seek female and minority referrals." Mr. Stortz also attached a sample of a part of one of the Stations' July 1989 recruitment letters. Mr. Stortz believed that the letters were evidence of the Station's then-current (i.e., July - September 1989) active efforts to recruit minorities and females. KFYO-FM had in fact sent the letters and Mr. Stortz had no intention of misleading the Commission by attaching a sample. (Church Ex. 4, pp. 17-18; see supra ¶ 84 (description of letters)).

4. The Need for Knowledge of Classical Music

92. During the License Term, the Stations believed that it was essential or highly desirable for announcers on KFYO-FM, and salespersons for the FM station, to be knowledgeable about

classical music. The FM station's view about the qualifications for announcers never changed. However, toward the end of the License Term, some managers' thinking evolved and they began to believe that general experience in sales was perhaps as or more important than knowledge of classical music as a qualification for salespersons. (Tr. 873-74; Church Ex. 4, p. 9).

93. The FM station's views about salespersons is best understood by reviewing the history of the station's sales efforts. Between 1983 and 1986, KFUE-FM did not hire its own salespersons but instead relied on an outside consultant, Concert Music Broadcast Sales ("CMBS"), to sell both national and local advertising time on the station. CMBS was (and is) an advertising representative firm devoted exclusively to sales of the classical radio format. In addition to its headquarters in New York City, CMBS has sales offices in Chicago, Dallas, Los Angeles, Atlanta, Detroit and San Francisco. (Church Ex. 4, p. 9; Church Ex. 5, p. 2).

94. In the early 1980's the founder of CMBS, Peter Cleary, had discovered that KFUE-FM was operating on a commercial frequency. CMBS had wanted a full-time classical music radio outlet in the St. Louis market so it contacted the Church to urge it to change KFUE-FM from a noncommercial operation. According to Mr. Cleary, it took him about three years of "arm twisting" before, in July 1983, the Church began to sell time on KFUE-FM. (Church Ex. 5, p. 1; see also Tr. 209).

95. When the Church decided that KFUE-FM would sell advertising in 1983, there was no sales staff either on KFUE-FM

or KFUA(AM). In fact, the Church had no previous experience in radio sales. Accordingly, CMBS agreed itself to become KFUA-FM's initial sales force, both nationally and locally. CMBS began by opening a St. Louis office in 1983 and hired as the only salesman Tom Jackson, who was experienced in radio and television sales and had an interest in and an understanding of classical music. (Church Ex. 5, p. 4). Mr. Jackson was an employee of CMBS. (Tr. 212).

96. In 1986, KFUA-FM determined that it would hire its own local sales force and rely on CMBS only for national sales. Mr. Cleary told the Stations' CEO, Reverend Devantier, that KFUA-FM should look for salespersons who had knowledge of classical music. (Tr. 217 lines 8-24; see also Tr. 220-21 (Cleary testimony that he also spoke to other people at KFUA-FM about the need for salespersons with a knowledge of classical music); Tr. 873 (Devantier testimony that CMBS "advised or counseled" a preference for salespersons with knowledge of classical music)). Reverend Devantier believed that salespeople should have knowledge of classical music. (Tr. 873). The salesperson initially hired by CMBS, Tom Jackson, was in Dennis Stortz's view knowledgeable about classical music. (Tr. 509). This accorded with Mr. Cleary's view that KFUA-FM's salespeople should have knowledge of classical music. Mr. Cleary believed that the station had to establish a new identity and then market it. (Church Ex. 5, p. 5). According to Mr. Cleary, the station needed salespeople who were comfortable with classical music and

could effectively project the essence of KFUE-FM's format to potential advertisers. (Church Ex. 5, p. 5).

97. When it came time to hire KFUE's own initial sales manager, Bern Hentze, Mr. Stortz proceeded on the same premise -- people with knowledge of classical music would be the best salespersons because they would know their "product." (Church Ex. 4, p. 10; Tr. 647-48).

98. Mr. Stortz testified that at times during the years 1986-1989, the turnover in KFUE-FM's sales force was great and economic pressures forced the Stations to hire replacements quickly. (Church Ex. 4, p. 10). Mr. Lauher confirmed in his testimony that it was a struggle to find anyone to work in a sales position from May 1987 to July 1989 because the salary structure was low and KFUE-FM was just initiating a sales effort. KFUE-FM had difficulty competing for job applicants with the more profitable St. Louis commercial stations. (Church Ex. 6, p. 1). Thus, there were instances in which the station had to settle for people who had less knowledge about classical music than it might ideally have liked and in some cases with no such knowledge. (Church Ex. 4, p. 10; Tr. 874). Moreover, towards the end of the License Term, at least some managers at KFUE-FM began to believe that general experience in sales was an equal or more important criterion. (See supra ¶ 92).^{33/} Nonetheless, Mr. Stortz and

^{33/} Mr. Cleary acknowledged that among sales/marketing circles, there developed in the late 1980's and into the 1990's the viewpoint that good, experienced sales people could sell anything and that a comfortable knowledge of classical music could be learned on-the-job. (Church Ex. 5, pp. 5-6). To
(continued...)

others continued to believe throughout the License Term that it was desirable for salespersons to have knowledge of classical music. (Church Ex. 4, p. 9; Church Ex. 5, p. 6; NAACP Ex. 58, p. 1 (Stortz view in September 1992 that a preference for salespeople with knowledge of classical music was rational, widely-accepted and not discriminatory)).

99. The desirability of classical music knowledge for various positions, including salespersons, did not in any way affect the Stations' willingness to recruit individuals of any race. The Stations had no sense that the requirement for familiarity with classical music would single out minorities for negative effect or would disqualify members of any race. Moreover, there is no evidence that any minority applicant was ever rejected for any position at KFUD-FM because he or she lacked knowledge of classical music or that any potential

³³/(...continued)

an advertiser, a station's product is its audience (Tr. 216); and an experienced salesperson can sell that audience. This view was shared by the NAACP's witnesses, Jan Hutchinson and Richard J. Miller. (NAACP Exs. 7, 12). Mr. Miller conceded, however, that "familiarity with the music is helpful." (NAACP Ex. 12, p. 1).

In any case, the important point is that Mr. Cleary of CMBS believed that because KFUD-FM was a previously noncommercial station with little audience and no advertiser brand-name recognition, the Station's formative image had to be developed and conveyed to the universe of advertisers. Also, because of its low billing levels, KFUD-FM was not able to attract truly experienced radio sales people. This meant that there was very little depth within KFUD-FM's selling ranks for on-the-job training. Hence, CMBS told Reverend Devantier that KFUD-FM should look for sales people who were comfortable with classical music, people who could talk credibly about the music. (Church Ex. 5, p. 6; Tr. 217, 220-21, 873).

applicant was ever discouraged from applying because of the requirement for a familiarity with classical music. (Church Ex. 4, p. 10; Tr. 511; see also NAACP Ex. 49, p. 3 (Dennis Stortz memorandum of January 1990 in which he stated: "As . . . KFUE and KFUE-FM searches for qualified people to fill its employment needs, there will be no racial barriers to block any applicants. However, applicants must qualify for positions requiring theological or classical music backgrounds. We will certainly seek any minorities having that background. It is the firm resolve of both stations to be in compliance with the EEO program submitted.")).

100. In reviewing and preparing the Equal Employment Program Report in September 1989, Dennis Stortz did not believe that he needed to mention that the Stations used knowledge of classical music as a criterion for certain positions. A sentence in the Report stated that: "When vacancies occur, it is the policy of KFUE and KFUE-FM to seek out qualified minority and female applicants." (Church Ex. 4, Att. 16, p. 7). Mr. Stortz believed that this sentence was consistent with the use of various employment criteria to find "qualified" applicants. (Church Ex. 4, p. 18).

101. On February 23, 1990, Arnold & Porter filed an "Opposition to Petition to Deny and Response to Inquiry" (the "Opposition") on behalf of the Stations in which there is an argument that because of KFUE-FM's classical music format, and the resulting need for certain employees to be knowledgeable about that format, the Commission should consider using

alternative data to the general labor force statistics in judging the results of certain of the Station's recruitment efforts.

(Church Ex. 4, Att. 7, pp. 14-16). Dennis Stortz reviewed this Opposition and provided an Affidavit concerning the truth of the facts therein, but did not formulate or draft the legal arguments. (Church Ex. 4, pp. 10-11 n.2). In the Church's view, the argument did not describe KFUE-FM's hiring practices, and said nothing about KFUE-FM's willingness to recruit for and hire minority individuals. (Church. Ex. 4, p. 10 n.2). Rather, as Marcia Cranberg testified, it was her idea to make the argument (Tr. 991-92, 1023) and her intention in citing statistics regarding the percentage of KFUE-FM listeners who were Black, Hispanic and Asian^{34/} was to make a different legal point -- concerning the appropriate labor force statistics to use.^{35/} (Church Ex. 8, pp. 6-7; Tr. 991-93; see also Joint Ex. 2, p. 29 line 24 - p. 30 line 1 (Reed Miller testimony that both he and Marcia Cranberg "were firmly convinced that there was never any intent to discriminate in any way with respect to" the argument about classical music)). Ms. Cranberg described her intent as follows:

The arguments were part of an overall discussion of a number of factors that I felt the Commission should

^{34/} The independent 1988 audit figures cited by Arnold & Porter indicated that approximately 3.7 percent of KFUE-FM's listeners at that time were Black. (Church Ex. 8, p. 6).

^{35/} Arnold & Porter, not the Church, also originated the argument made in pleadings to the Commission that "management turnover [such as that at KFUE] should be taken into account in assessing a station's compliance with EEO requirements." (Tr. 996-97).

take into account in assessing the station's employment profile, including the small number of employees overall at the stations, the fact that the stations had a greater number of minority employees over the license period than were reflected in the annual employment reports, and the fact that a significant number of positions required very specialized skills such that relying on overall labor forces -- didn't seem to be a very precise way of measuring the station's performance. That was my purpose in, in making the argument.

(Tr. 992 lines 12-22).

102. Ms. Cranberg confirmed Mr. Stortz's view that the Opposition did not state (and did not intend to imply) that KFUD-FM had not or would not continue to engage in affirmative action recruitment efforts because of these statistics. Arnold & Porter also did not mean to imply that the station viewed such recruitment efforts as pointless. Indeed, Arnold & Porter had no reason to believe based on its dealings with personnel at the Stations that either of these supposed implications of its statements was true. (Church Ex. 8, p. 7).

103. Arnold & Porter presented the statistics regarding KFUD's minority listeners in the February 1990 Opposition in a preliminary effort to argue that statistics should take into account the relevant pool of qualified individuals for particular specialized employment positions in order to have any meaning. (Church Ex. 8, pp. 6-7). Ms. Cranberg made the argument after asking "Dennis Stortz whether there were any positions at the station that required specialized skills or background, and Dennis responded in the affirmative. And on the basis of that information he supplied . . . [Ms. Cranberg] argued to the Commission in numerous . . . pleadings that it would make sense

for the Commission to consider alternative availability figures for certain positions that required very specialized skills." (Tr. 990-91). In Ms. Cranberg's view, this was a method of analysis the FCC had specifically endorsed in Equal Employment Opportunity Guidelines, 47 R.R.2d 1689 (1980). It was also a method of analysis which Arnold & Porter had previously employed before the Commission on behalf of other broadcast clients, including classical music station WFLN in Philadelphia. (Church Ex. 8, p. 7; Joint Exhibit 2, p. 27). WFLN had stated to the Commission, in response to an EEO challenge concerning its hiring of minorities, that its programmer needed to "love" classical music, and that its announcers needed "a working knowledge of classical music" and "a reading knowledge of French, German, Italian and Spanish as well as English." (Joint Ex. 2, Att. 1, pp. 20, 21). WFLN had then argued that because its format was "highly specialized, [o]ver the years, it has been difficult to find any employees with the skills required in musical knowledge and foreign languages."^{36/} (Joint Ex. 2, Att. 1, p. 25). In denying the EEO challenge to WFLN, the unanimous Commission (Commissioner Hooks, concurring) did not comment on, much less criticize, this argument by WFLN. (Joint Ex. 2, Att. 2). The Arnold & Porter partner in charge of the KFUD account, Reed Miller, had been involved in the WFLN case and suggested to Ms. Cranberg that she could use the same argument. (Joint Exhibit 2, pp. 27-28, 30).

^{36/} Franklin Broadcasting Co., 57 F.C.C.2d 130 (1975).